

IN THE UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF ARKANSAS
HELENA DIVISION

IN RE: DEWITT BUSBY, JR.

CASE NO. 00-20283M
CHAPTER 7

Debtor.

ORDER

The issue in this case is whether DeWitt Busby, Jr. (“Debtor”) may avoid the lien of Bob Cole Bail Bonds, Inc. (“Bob Cole”) as impairing the Debtor’s exemption in certain of his personal property used as tools of the trade. After a hearing on the motion to avoid lien on November 9, 2000, in Helena, Arkansas, the Court took the matter under advisement.

The matter before the Court is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(O), and the Court has jurisdiction to enter a final judgment in the case.

FACTS

The facts are as follows. On August 1, 2000, the Debtor filed a voluntary petition for relief under the provisions of chapter 7 of the United States Bankruptcy Code. Prepetition, the Debtor had granted a security interest to Bob Cole in certain items of personal property to secure a bail bond for a friend. The friend defaulted on the bond, and in June of 2000 the creditor obtained an Agreed Order of Delivery of the Debtor’s collateral securing the bail bond. The Debtor was ordered to sell the collateral and deliver the proceeds to Bob Cole or, in the event the collateral was not sold, to deliver the collateral to Bob Cole by August 1, 2000. The Debtor filed for relief

before any property was delivered to Bob Cole.

Schedule D of the Debtor's petition listed Bob Cole as a secured creditor with a secured claim of \$15,200.00, with \$3750.00 of that amount described as unsecured. (Schedule D-Creditors Holding Secured Claims.) The collateral for the secured obligation was valued at a current market value of \$11,450.00 and consisted of implements and tools of the trade of the Debtor and a 1972 boat. At trial, the Debtor stated that the boat had a fair market value of \$500.00.

The Debtor claimed all of the collateral as exempt pursuant to subsections 522(d)(5) and (6) of the United States Bankruptcy Code. The Debtor valued the claimed exemption as "zero," presumably in recognition of the secured claim which exceeded the value of the exempt property. The current market value of the property without deducting exemptions was listed at \$11,450.00, but the Debtor estimated at trial that the property would probably not net more than \$5000.00 if offered for sale.

After the Debtor filed his chapter 7 petition, he initiated a proceeding pursuant to 11 U.S.C. § 522(f)(A) & (B) to avoid the lien of Bob Cole because it impaired an exemption. The Debtor alleged that the lien was a nonpossessory, nonpurchase-money security interest in "implements and tools of the trade of the Debtor" or items "held for personal use of the Debtor." The Debtor also alleged that the lien created by the Agreed Order of Delivery could be avoided as a judicial lien which impairs an exemption. He argued in his brief that combined exemption

amounts allowed under subsections 522(d)(5) and (6) permit him to exempt the value of tools of the trade to the extent of \$10,550.00. Furthermore, he stated that

pursuant to sections 522(h) and 544 of the Bankruptcy Code, he may avoid Bob Cole's security interest because it is unperfected.¹

Bob Cole argued that the Debtor can only avoid its lien under section 522(f) to the extent of the allowable exemption permitted under subsections 522(d)(5) and (6). The creditor's position is that the Debtor has \$4,065.50 available to apply to the exemption in the collateral because the Debtor has applied the remaining available exemption amount to other property claimed as exempt under section 522(d)(5).

LAW

Pursuant to section 522, the Bankruptcy Code provides that the debtor may avoid the fixing of certain liens on an interest in the Debtor's property "to the extent that such lien impairs an exemption to which the debtor would have been entitled" under the provisions of the exemption statute. 11 U.S.C. § 522 (f)(1) (1994).

Under the Bankruptcy Code, a debtor has an interest in property even if it is fully

¹The Debtor did not request this relief in his motion to avoid lien and has not filed a complaint to initiate an adversary proceeding pursuant to section 544. Federal Rules of Bankruptcy Procedure 7001, 7003. See, e.g., Canelos v. Mignini (In re Canelos), 216 B.R. 159 (Bankr. D. Md. 1997) (ruling debtors must file complaint for recovery of preferential transfer and may not do so by motion).

encumbered by liens such that the debtor has only an equitable or possessory interest. In re Van Zant, 210 B.R. 1011, 1015 (Bankr. S.D. Ill. 1997) (citations omitted). Section 522(f) applies to exemptions in the debtor's interest to which the debtor would have been entitled, whether or not those exemptions were actually claimed in the schedules. Corson v. Fidelity & Guaranty Ins. Co. (In re Corson), 206 B.R. 17 (Bankr. D.Conn. 1997) (holding judicial lien not avoidable because debtor not entitled to exemption under state law); In re Moe, 179 B.R. 654, 656 (Bankr. D.Mont. 1995) (stating that under section 522(f), court considers exemption debtor could claim, not actually claimed in schedules).

Avoidable liens include certain judicial liens and nonpossessory, nonpurchase-money security interests in items for personal, family or household use or in tools of the trade of the debtor. 11 U.S.C. § 522 (f)(1)(A) & (B)(i)-(ii) (1994). See, e.g., In re Corson, 206 B.R. at 22 (permitting partial avoidance under section 522(f) of judicial lien in homestead); In re Cushman, 183 B.R. 139, 143 (Bankr. N.D. Ohio 1995) (allowing section 522(f) avoidance of nonpossessory, nonpurchase-money security interest in household goods).

Pursuant to the Bankruptcy Code, a lien is “a charge against or interest in property to secure payment of a debt or performance of an obligation.” 11 U.S.C. §101(37)(1994). A judicial lien is a “lien obtained by judgment, levy, sequestration, or other legal or equitable process or proceeding.” 11 U.S.C. § 101(36)(1994). A security interest is a lien created by agreement. 11 U.S.C. § 101(51)(1994).

Under these definitions as applied to section 522(f) and the facts in the case, Bob Cole's

lien is a nonpossessory, nonpurchase-money security interest. The Debtor granted Bob Cole a charge against his property to secure the payment of a friend's bail bond. The lien was consensual, having been created as a result of a security agreement between the parties such that a security interest in the property arose. Additionally, the creditor is not in possession of the collateral, and the money supplied the Debtor was for the purpose of paying the bail bond, not to purchase the collateral at issue.

At trial, the Court made a specific finding that, with the exception of the boat, the collateral securing the Debtor's obligation would be classified as tools of the trade. Thus, Bob Cole's nonpossessory, nonpurchase-money security interest in the Debtor's tools of the trade may be avoided to the extent the lien impairs an exemption pursuant to section 522(f)(1)(B).

However, the Court is unpersuaded by the Debtor's argument that the boat is an item held for personal use so that the lien in this item is subject to avoidance under the provision for nonpossessory, nonpurchase-money security interests. The statute allows lien avoidance in the case of "household furnishings, household goods, wearing apparel, appliances, books, animals, crops, musical instruments, or jewelry that are held primarily for the personal, family or household use of the debtor or a dependent of the debtor." 11 U.S.C. § 522(f)(1)(B)(i)(1994). A boat maintained for pleasure or sport clearly does not fit under any category in this subsection. Franchi v. Stanley's Boat Yard, Inc., (In re Franchi), 148 B.R. 155, 157 (Bankr. D.R.I. 1992)(stating that recreational sailboat is neither a household furnishing nor household goods)(citing In re Ellen Marie DiPalma, 24 B.R. 385 (Bankr. D.Mass. 1982)).

The Debtor also argues that the Agreed Order of Delivery issued by the state court prior to bankruptcy created a judicial lien in the collateral. However, the Order only directed the Debtor to sell the collateral and remit the proceeds to Bob Cole by a certain date. The Order did not expressly grant Bob Cole a lien in the collateral, nor is the Court aware of any statutory authority or caselaw that construes an order of delivery as conveying a judgment lien. Bob Cole's interest in the collateral clearly derives from its security interest and not from any judicial proceeding.

The focus of the dispute between the parties is whether and to what extent Bob Cole's security interest impairs an exemption to which the Debtor would have been entitled but for the lien. The Debtor relies on subsections 522(d)(5) and (6) of the Bankruptcy Code to demonstrate that he would have been entitled to an exemption in tools of the trade.

In accordance with subsection 522(d)(6), it is clear that the Debtor may exempt \$1625.00 of his aggregate interest in any implements or tools of the trade, and the creditor concedes as much. See, 11 U.S.C. § 522(d)(6)(1994). Additionally, the Debtor is entitled to an exemption in the collateral under subsection 522(d)(5), the so-called "wild-card exemption." That subsection provides for an exemption in the following type of property: "The debtor's aggregate interest in any property, not to exceed in value \$850 plus up to \$8075 of any unused amount of the exemptions provided under paragraph (1) of this subsection." 11 U.S.C. 522(d)(5)(1994).

Because the Debtor has exempted no interest in property pursuant to subsection 522

(d)(1), he is entitled to exempt his interest in any other property up to the \$8925.00 statutory limit. See, e.g., Martin v. Cox (In re Martin), 140 F.3d 806, 807 (8th Cir. 1998) (holding that debtor not exempting property under 522(d)(1) was entitled to full wild-card exemption amount); In re Cavanaugh, No. Civ. A. 95-4408, 1995 WL 602487, at *2 (E.D. Pa. Oct. 11, 1995) (permitting debtor to use wild card exemption to shelter interest in any property).

The Debtor's Schedule C-Property Claimed As Exempt indicates that, in addition to the tools of the trade at issue, the Debtor has claimed the following property as exempt under the wildcard exemption: Case backhoe; John Deere tractor, Yanmar tractor--\$0.00 value; cash on hand--\$60.00 value; Checking account at FNB of EA--\$5,500.00 value; Landmark Baptist Church--\$800.00 value. Thus, the value of the Debtor's interest in property claimed as exempt pursuant to Section 522(d)(5) totals \$6360.00.

Deducting this total from the statutory limit of \$8925.00, the Court finds that Section 522(d)(5) permits the Debtor to claim additional exemptions in tools of the trade in the sum of \$2565.00. When added to the exemption of \$1625.00 available under subsection 522(d)(6), the total allowable exemption in the Debtor's interest in tools of the trade is \$4190.00.

Whether and to what extent Bob Cole's lien impairs the Debtor's exemption is determined by an arithmetic formula set forth in the Bankruptcy Code. The applicable statute provides:

- (2)(A) For the purposes of this subsection, a lien shall be considered to impair an exemption to the extent that the sum of--
- (i) the lien,
 - (ii) all other liens on the property; and
 - (iii) the amount of the exemption that the debtor could claim if there

were no liens on the property;
exceeds the value that the debtor's interest in the property would have
in the absence of any liens.

11 U.S.C. § 522(f)(2)(A)(1994).

The creditor's secured claim and, therefore, its lien in the property is listed on the Debtor's schedules as \$15,200.00. No other liens in the property were established by the schedules and other evidence at the hearing. As previously stated, the amount of the exemption the Debtor could claim if there were no liens in the property is \$4190.00.

The Debtor's "interest in the property" as used in the section 522(f)(A) formula is the fair market value of the property. Canelos v. Mignini (In re Canelos), 216 B.R. 159, 165 n.6 (Bankr. D. Md. 1997) (citing Fitzgerald v. Davis (In re Fitzgerald), 729 F.2d 306 (4th Cir. 1984); In re Abrahamzadeh, 162 B.R. 676 (Bankr. D.N.J. 1994); In re Gonzalez, 149 B.R. 9 (Bankr. D.Mass. 1993), rev'd on other grounds sub nom. Gonzalez v. First Nat'l Bank of Boston, 1991 B.R. 2 (D. Mass. 1996)). The value of the Debtor's interest in all of Bob Cole's collateral is \$11,450.00, according to the schedules. The Debtor testified that the boat, which is not included in the calculation because not subject to lien avoidance, had a fair market value of \$500.00. Therefore, the Debtor's interest in the property is \$10,950.00 when the boat is excluded from the calculation.

Pursuant to the section 522(f)(2)(A) formula, the extent of impairment is as follows:

| | |
|-------------|----------------------------------|
| \$15,200.00 | Bob Cole's lien |
| + | Other liens in collateral |
| 0.00 | |
| + | Exemption in collateral to which |
| 4,190.00 | debtor would have been entitled |
| | . |
| <hr/> | |
| \$19,390.00 | Total |

| | | |
|---|-------------|-----------------------------------|
| - | \$10,950.00 | Debtor's interest in the property |
| | <hr/> | |
| | \$ 8,440.00 | Impairment of exemption |

Under the statutory calculation, the Debtor may avoid Bob Cole's \$15,200.00 lien in the amount of \$8440.00 as impairing an exemption. Bob Cole's lien remains as an encumbrance on the property in the amount of \$6760.00.

For examples of the application of the arithmetic formula, see, Bank of America Nat'l Trust & Savs. Assoc. v. Hanger (In re Hanger), 217 B.R. 592 (B.A.P. 9th Cir. 1997) (holding lien only avoidable to extent it impaired the Debtor's homestead exemption and not avoidable in its entirety), aff'd 196 F.3d 1292 (9th Cir. 1999); In re Canelos, 216 B.R. at 165 (stating that lien partially impaired exemption under formula); In re Gostian, 215 B.R. 237, 239 (Bankr. M.D. Ala., 1997) (calculating lien impairment of homestead exemption under formula); Corson v. Fidelity & Guaranty Ins. Co. (In re Corson), 206 B.R. 17, 22 (Bankr. D. Conn. 1997) (finding lien on homestead could be avoided to extent of \$137,164.82); In re Jakubowski, 198 B.R. 262 (Bankr. N.D. Ohio 1996) (ruling that amount of impairment exceeded lien to the extent that creditor's lien could be totally avoided).

CONCLUSION

Pursuant to the Bankruptcy Code's lien avoidance statute, the lien of Bob Cole impairs an

exemption of the Debtor and may be avoided in the sum of \$8440.00. Bob Cole retains its lien in the sum of \$6760.00.

IT IS SO ORDERED.

U. S. BANKRUPTCY JUDGE

DATE: _____

cc: A. Jan Thomas, Trustee
James C. Luker, Esq.
Richard Rhodes, Esq.
Debtor